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Decision

Matter of: CIGNA Government Services, LLC

File: B-297915.2

Date: May 4, 2006

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Kathleen E. Karelis, Esq., W. Jay DeVecchio, Esq., Kevin Dwyer, Esq., and Richard Arnholt, Esq., Jenner & Block LLP, for Palmetto GBA, LLC, an intervenor.
Jeffri Pierre, Esq., Anthony E. Marrone, Esq., and Christine Simpson, Esq., Department of Health & Human Services, for the agency.
Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's communications with awardee following submission of final revised proposals, during which awardee made various changes to its final proposal submission, including changes to the total level of effort awardee represented it would provide under the contract, constituted discussions and required that the agency similarly conduct discussions with the protester.

DECISION

CIGNA Government Services, LLC protests the award of a contract by the Department of Health & Human Services, Centers for Medicare and Medicaid Services (CMS), to Palmetto GBA, LLC pursuant to request for proposals (RFP) No. CMS-2005-0012 for Medicare claims processing services related to claims from suppliers and beneficiaries of durable medical equipment.¹ CIGNA protests, among

¹ CIGNA has protested two separate contracts awarded under the same solicitation: one awarded to Palmetto GBA, LLC, and one awarded to Noridian Administrative Services, LLC. In response to CIGNA's initial protest submission and its supplemental submissions, our Office opened two docket numbers: B-297915 and B-297915.2. We are addressing in this decision, under docket number B-297915.2, all protest issues regarding the award to Palmetto, and are addressing in a separate (continued...)

other things, that the agency failed to conduct meaningful discussions with CIGNA and permitted Palmetto to materially revise its proposal after final proposal revisions had been submitted.

We sustain the protest.

BACKGROUND

In December 2003, Congress enacted the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA). Among other things, this legislation requires that CMS use competitive procurement procedures, pursuant to the Federal Acquisition Regulation (FAR), to replace the fiscal intermediaries and carriers on whom CMS has historically relied for claims processing services,² and who have been selected under other than competitive procedures. The replacement contractors under the MMA are referred to as “Medicare Administrative Contractors” (MACs). Pursuant to the transition, and in contrast to past practice, MACs are also required to comply with the Cost Accounting Standards (CAS).

In April 2005, CMS issued RFP No. CMS-2005-0012, seeking proposals, for each of four geographic jurisdictions,³ to provide specified health insurance benefit administration services, including Medicare claims processing and payment services

(...continued)

decision, under docket number B-297915, all protest issues regarding the award to Noridian.

² In general, fiscal intermediaries have been responsible for processing Medicare payments for institutional providers (for example, hospitals and skilled nursing facilities) under Part A of the Medicare program; carriers have been responsible for processing payments for professional providers (for example, physicians and diagnostic laboratories) under Part B of the Medicare program. More specifically, contractors known as “durable medical equipment regional carriers” (DMERCs) have been responsible for processing Medicare claims for durable medical equipment under Part B of the Medicare program. RFP, Statement of Work, at 12.

³ The jurisdictions were defined, according to state/territory boundary lines, as follows: Jurisdiction A--Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont; Jurisdiction B--Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin, Kentucky; Jurisdiction C--Alabama, Arkansas, Colorado, Florida, Georgia, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virgin Islands, Virginia, West Virginia; Jurisdiction D--Alaska, Arizona, California, Guam, Hawaii, Idaho, Iowa, Kansas, Missouri, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming, Mariana Islands, American Samoa. RFP, Statement of Work, at 12.

related to durable medical equipment, prosthetics, orthotics and supplies (DMEPOS).⁴ RFP § B.1. The procurements for each jurisdiction were conducted as separate competitions, but offerors were permitted to submit proposals for any or all of the jurisdictions. The solicitation provided that the source selection decision for each jurisdiction would be made on the basis of the proposal offering the best overall value to the government, considering cost/price and the following non-cost/price factors, listed in descending order of importance: offeror capability,⁵ implementation,⁶ quality control plan, corporate experience, past performance, and small disadvantaged business utilization plan. RFP § M.4. The solicitation provided that non-cost/price factors, when combined, were significantly more important than cost/price, and that cost/price would not be point scored but would be evaluated for cost realism. RFP §§ M.2, M.7.

On or before the specified closing date, Palmetto and CIGNA submitted initial proposals for the jurisdiction C contract. Thereafter, technical proposals were

⁴ The solicitation's statement of work provided an overview of the required tasks, stating:

The contractor shall receive and control Medicare claims from DMEPOS suppliers and beneficiaries within its jurisdiction, as well as perform edits on those claims to determine whether the claims are complete and should be paid. . . . In addition, the Contractor calculates Medicare payment amounts and remits those payments to the appropriate party. The Contractor makes coverage decisions for new procedures and devices in local areas. The Contractor also conducts a variety of different suppliers services, such as answering written inquiries, and educating them on Medicare's rules and regulations and billing procedures.

RFP, Statement of Work, at 13-14.

⁵ With regard to offeror capability, the solicitation established the following subfactors, listed in descending order of importance: understanding the requirements, project management, key personnel, information security, and compliance plan. RFP § M.4, at 163.

⁶ With regard to the implementation factor, the solicitation established the following subfactors, listed in descending order of importance: implementation plan, key personnel, and implementation risk. RFP § M.4, at 163.

evaluated by a technical evaluation board (TEB)⁷ and cost/price proposals were evaluated by a business evaluation panel (BEP).⁸

Upon completing the evaluation of initial proposals, the evaluation panels provided a summary of the evaluation results to the contracting officer. AR, Tab 24. With regard to the non-cost/price evaluation factors, Palmetto's proposal received a total score of [deleted] points (out of a maximum 1,000 points); CIGNA's proposal received a score of [deleted] points. AR, Tab 24, at 2, 14. Palmetto's proposed cost/price was [deleted] million; CIGNA's proposed cost/price was [deleted] million.⁹ AR, Tab 41, at 9.

In reviewing the initial proposals for all jurisdictions, the agency found that, because of the new requirement that contractors comply with the CAS, the offerors' identified the levels of effort being proposed in differing ways; due to this, the agency found it difficult to determine the level of effort being proposed by each offeror. Hearing Transcript (Tr.), Apr. 6, 2006, at 848-50.¹⁰

By letters dated August 24, 2005, the agency initiated discussions with CIGNA and Palmetto. AR, Tab 43. Due to the agency's difficulty in determining each offeror's proposed level of effort, the agency created a "level of effort" (LOE) template for offerors to complete, sending that template to offerors with the August 24 discussion letters.¹¹ With regard to the LOE template, the discussion letters stated:

⁷ Subject matter experts (SMEs) were also assigned to assist the TEB, but the SMEs did not point score the proposals.

⁸ There was also a corporate experience/past performance panel to evaluate proposals under those factors, and an implementation panel to evaluate proposals under the implementation factor.

⁹ The cost/price figures in this decision are rounded to the nearest tenth of a million.

¹⁰ In reviewing CIGNA's protest issues, our Office conducted a hearing at GAO during which testimony was provided by various witnesses, including the source selection authority, the contracting officer, and various evaluation personnel. The hearing took place from April 4 through April 6, 2006; accordingly, the transcripts for each day's testimony are identified by reference to their respective dates.

¹¹ The LOE template consisted of a table. Across the top of the table, the agency listed various functional requirements of the contract; along the side of the table, the agency listed the various contract line item numbers (CLINs) and, under each CLIN, the words "Prime," "Subcontractor A," "Subcontractor B," "Subcontractor C," and "Subcontractor D." AR, Tab 43. It is clear the agency anticipated that offerors would identify the number of labor hours that would be provided under each CLIN, by the prime contractor or a subcontractor, to perform the various functional requirements listed across the top of the table.

CMS is requesting that you confirm your proposed level of effort by completing the enclosed template as instructed. The template shall include all productive hours to fulfill the statement of work requirements related to your proposal. This includes those hours charged to the contract whether those hours are allocated through an indirect cost pool or to an ABC code. Your subcontractor hours shall be identified as well. The hours shall be provided by contract year for all years. In order to fully understand your proposed level of effort, CMS is asking that you confirm your proposed level of effort by way of completing this template. You are cautioned that this is not a request to revise your Business Proposal. Rather it is an analysis tool that will be used to better understand your proposed level of effort.^[12]

AR, Tab 43, at 1-2.

Both CIGNA and Palmetto responded to the initial discussions by submitting, among other things, the LOE templates; thereafter, each offeror participated in various rounds of discussions, both written and oral, submitting various further clarifications, modifications, and revisions to their proposals.

On November 30, the agency requested submission of final revised proposals (FRPs). In its request, the agency expressly provided that the updated LOE templates were to be included as part of the FRPs. AR, Tab 37, FRP Request (Nov. 30, 2005), at 2-3.

On December 9, CIGNA and Palmetto submitted their respective FRPs; these final proposals were subsequently evaluated by the various evaluation panels. With regard to the non-cost/price evaluation factors, CIGNA's FRP received a point score of [deleted]; Palmetto's FRP received a point score of [deleted]. AR, Tab 41, at 21. CIGNA's final proposed cost/price was [deleted] million; Palmetto's final proposed cost/price was [deleted] million. Id.

On December 15, the contracting officer made a presentation to the source selection board (SSB) and the source selection authority (SSA) during which she presented the evaluation results and made award recommendations for each of the four jurisdictions. With regard to jurisdiction C, the contracting officer recommended award to Palmetto. In her presentation and recommendation with regard to

¹² The record is clear that the agency intended that an offeror's LOE template would be consistent with and complement the other portions of its proposal, and that the templates reflected each offeror's specific representation regarding the level of effort its proposal was offering to provide. Further, as discussed at the hearing, the specific information contained in the template was not identifiable from any other portion of the offerors' proposals. Tr., Apr. 6, 2006, at 851.

jurisdiction C, the contracting officer identified the following factors under the heading “Best Value/Trade-Off Analysis”: CIGNA’s technical score was [deleted], but CIGNA’s cost/price was [deleted]; Palmetto’s evaluated weaknesses were not considered to present a risk for successful contract performance; and Palmetto had proposed a [deleted] level effort than CIGNA.¹³ AR, Tab 41, at 26. In a memorandum dated January 4, the SSB essentially repeated the information reflected in the contracting officer’s December 15 recommendation, concurring in the recommended award to Palmetto for jurisdiction C. AR, Tab 45, at 6. On January 6, the SSA executed the source selection decisions for all four jurisdictions, selecting Palmetto for award of the jurisdiction C contract, stating: “Based upon the recommendations of the Contracting Officer and concurrence given by the SSB, I hereby decide as the Source Selection Authority to award the DME MAC contracts and optional/specialty services to the offerors identified above.”¹⁴ AR, Tab 45, at 16.

On January 20, the agency conducted a debriefing with CIGNA regarding the source selection decision. On January 24, 2006, CIGNA filed its initial protest with this Office.

DISCUSSION

In its January 24 protest, CIGNA challenged various aspects of the source selection process, arguing, among other things, that CMS failed to conduct meaningful discussions with CIGNA and misevaluated various aspects of CIGNA’s and Palmetto’s proposals.

On February 23, the agency filed its required administrative report, responding to the January 24 protest. With that report, the agency produced the evaluation record on which the source selection decision was based. Upon reviewing the agency record, CIGNA’s counsel found that some of the specific data submitted in Palmetto’s FRP, including its LOE template, differed from data on which the agency’s source selection decision was based. Accordingly, CIGNA filed a supplemental protest on March 6.

¹³ There is no dispute that the agency’s assessment regarding Palmetto’s [deleted] level of effort was based on data drawn from some version of the offerors’ LOE templates. Tr., Apr. 6, 2006, at 893-94.

¹⁴ As noted above, CIGNA’s proposal was rated [deleted] with regard to the more-important non-cost/price factors, but offered [deleted] cost/price. Accordingly, in selecting Palmetto’s proposal for award in this [deleted], the agency was required to determine that the [deleted] associated with Palmetto’s proposal were significant enough to offset CIGNA’s [deleted] with regard to the [deleted].

Following submission of CIGNA's March 6 protest, the agency, for the first time, advised our Office of various communications that had taken place between CMS and Palmetto after the December 9 deadline for submission of FRPs.¹⁵ First, the agency revealed that on December 13, several days after FRPs had been submitted, [a Palmetto official] sent an e-mail to the contracting officer and the BEP chair, stating, in part, as follows:

I left you a voice mail message earlier regarding our input . . . on the labor template. In the [deleted] hours, we [deleted], causing us to grossly overstate the labor hours in our LOE template for that activity. I have attached the accurate hour and FTE totals.

Agency's March 17, 2006 Response to Supplemental Protest, attach. (E-mail, Dec. 13, 2005, 5:03 p.m.).

At the GAO hearing, the BEP chair acknowledged that, during the week after FRPs were submitted, she telephoned a Palmetto official with questions regarding the data contained in Palmetto's final LOE template. Tr. at 984. The BEP chair elaborated that, in reviewing Palmetto's FRP, the agency evaluators determined that Palmetto had [deleted] the level of effort it represented it would provide in performing the DMEPOS contract. Accordingly, the BEP chair testified that she had telephoned a Palmetto official to ask him to "confirm the hours in his [LOE] template." Tr., Apr. 6, 2006, at 1029. The December 13 e-mail, quoted above, reflected Palmetto's response to the BEP chair's telephone call. Rather than confirming the validity of its FRP, Palmetto stated that it was, in fact, materially inaccurate.

At the GAO hearing, the BEP chair acknowledged that, although it was clear from the agency's post-FRP communications with Palmetto that Palmetto intended to make some changes to templates that had previously been submitted, Tr., Apr. 6, 2006, at 1,060, there was no way to discern from the face of Palmetto's FRP

¹⁵ Pursuant to GAO's Bid Protest Procedures, 4 C.F.R. § 21.1(d)(2) (2006), CIGNA's protest specifically requested that the agency report include "All . . . correspondence related in any way to the proposal[] . . . of . . . Palmetto." Protest, Jan. 24, 2006, at 88. As discussed below, the agency had in its possession several post-closing-date e-mails from Palmetto that indisputably constituted correspondence related to Palmetto's proposal, yet the agency failed to produce this correspondence with its February 23 report. The agency's first disclosure of any post-FRP communications was made to our Office on March 17.

submission what level of effort Palmetto intended its final submission to reflect.¹⁶ Tr. 1,062-63; see also Tr. Apr. 6, 2006, at 924.

The communications between CMS and the agency regarding Palmetto's LOE template were not their only post-FRP communications. On March 29 (after GAO had announced it would conduct a hearing in this matter), CMS advised our Office of additional post-FRP e-mails between Palmetto and CMS. Specifically, CMS disclosed that, on December 13, just minutes after [a Palmetto official] sent the above-discussed e-mail to CMS, Palmetto personnel sent another e-mail to the BEP chair, stating on the subject line, "Revised DMAC schedules." Letter from CMS to GAO, Mar. 29, 2006, attach. This e-mail states, in part: "Please see the attached errata sheet with changes from our proposal submitted on December 9, 2005." Id. Among other things, that e-mail included the following table:¹⁷

Item Affected	DME MAC Business Proposal
[deleted], Activity Code [deleted], subCLIN [deleted], CLIN [deleted]	The indirect rate for [deleted] cost pool was incorrect. The rate in proposal was [deleted] but the rate should have been [deleted].
[deleted], subCLIN [deleted], CLIN [deleted]	Subtotal [deleted] formula was not calculating correctly.
[deleted], subCLIN [deleted], CLIN [deleted]	The Total cost for the positions listed below were linked to the incorrect subCLIN. The dollars were actually for subCLIN [deleted] instead of [deleted]. • [deleted] • [deleted] • [deleted]

Id.

¹⁶ As noted in Palmetto's December 13 e-mail, Palmetto represented that its "gross[] overstate[ment]" of the proposed level of effort was an aggregation of errors [deleted]. Agency's March 17, 2006 Response to Supplemental Protest, attach. (E-mail, Dec. 13, 2005, 5:03 p.m.); Palmetto FRP, Dec. 9, 2005, Vol. II, Tab D (LOE Template), at 45-46. In a post-protest submission to our Office, [a Palmetto official] states that the errors were actually made in yet another schedule, [deleted], from which the LOE template data was derived.

¹⁷ The format of the table mirrors the format the agency, in its November 30 FRP request, required offerors to use in submitting final proposal revisions to their cost/price proposals. AR, Tab 37, FRP Request, at 3.

At the GAO hearing, Palmetto personnel maintained that there was a [deleted] on Palmetto's overall cost/price as a result of the changes described in this e-mail. See, e.g., Tr., Apr. 6, 2006, at 1,143, 1,146. However, the Palmetto personnel also testified that the table itself contains an error, specifically asserting that the statement "Subtotal [deleted] formula was not calculating correctly" should have referenced CLIN [deleted], rather than CLIN [deleted]. Tr., Apr. 6, 2006, at 1144.¹⁸

Communications between a procuring agency and an offeror that permit the offeror to materially revise or modify its proposal generally constitute discussions. FAR § 15.306(d); Lockheed Martin Simulation, Training & Support, B-292836.8 et al., Nov. 4, 2004, 2005 CPD ¶ 27; 4th Dimension Software, Inc.; Computer Assocs. Int'l, Inc., B-251936, B-251936.2, May 13, 1993, 93-1 CPD ¶ 420. In this regard, communications that permit an offeror to correct a mistake constitute discussions unless the mistake is minor and both the existence of the mistake and what was actually intended are clearly apparent from the face of the proposal. Matrix Int'l Logistics, Inc., B-272388, B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89; Stacor Corp., B-231095, July 5, 1988, 88-2 CPD ¶ 9. If an agency does conduct discussions with one offeror, it must conduct discussions with all competitive range offerors, and provide all such offerors an opportunity to submit revised proposals. KPMG Peat Marwick, LLP, B-259479, May 9, 1995, 95-2 CPD ¶ 13; Paramax Sys. Corp., B-253098.4 et al., Oct. 27, 1993, 93-2 CPD ¶ 282.

Here, it is clear the agency conducted discussions with Palmetto following submission of FRPs. As discussed above, the agency's FRP specifically provided that the LOE templates were a required part of the offerors' cost/price proposals. AR, Tab 37, FRP Request (Nov. 30, 2005), at 2-3. With regard to the materiality of the error in the LOE template, Palmetto itself characterizes its FRP submission as reflecting a "gross[] overstate[ment]" of its intended level of effort, and the agency's contemporaneous documents establish that the agency relied on Palmetto's post-FRP revisions regarding the proposed level of effort in making the contracting officer's and SSB's award recommendations, and the SSA's source selection decision. AR, Tab 41, at 21; Tab 45, at 6, 16. Finally, as acknowledged by the BEP chair during the GAO hearing, the agency could not discern Palmetto's intent with regard to the final proposed level of effort from the face of Palmetto's FRP without the additional post-FRP submissions. On this record alone, it is clear the post-FRP communications constituted discussions.

In addition, Palmetto's post-FRP submission of various other changes to its cost/price proposal support the conclusion that discussions were conducted. With

¹⁸ In addition to the two e-mails discussed above, the agency disclosed on March 29 that Palmetto had sent yet another post-FRP e-mail to CMS on December 12, revising yet another aspect of the cost/price Palmetto submitted in its FRP. This e-mail appears to correct a mathematical error. Id.

regard to Palmetto's December 13 e-mail referencing "Revised DMAC Schedules," and including the table listing various errors in its FRP, it is clear that neither the existence of the errors identified in that table, nor what Palmetto's actual intentions were with regard to the errors, was apparent from the face of Palmetto's FRP. Specifically, it is clear that Palmetto's proposed rate of [deleted] for the "[deleted] cost pool," was not an obvious error apparent from the face of Palmetto's proposal, nor was there any way for the agency to determine that the rate "should have been" [deleted]. Similarly, since Palmetto testified that the errata table itself contains an error, there can be no suggestion that the face of Palmetto's FRP clearly established what Palmetto intended in this regard.

On this record, we reject the agency's and Palmetto's assertions that the post-FRP communications, during which the agency permitted Palmetto to make significant revisions to its proposal, should be considered as merely minor corrections. Rather, the communications clearly constituted discussions concerning material aspects of Palmetto's proposal, which triggered the agency's obligation to give CIGNA a similar opportunity to revise its proposal.¹⁹

The protest is sustained.

RECOMMENDATION

As discussed above, we find that the agency conducted discussions with Palmetto following submission of the FRPs. Accordingly, we recommend that the agency reopen discussions with the competitive range offerors in this procurement, request revised proposals, evaluate those submissions consistent with the provisions of the solicitation, and make a new source selection decision. In the event CIGNA's proposal is found to represent the best value to the government, Palmetto's contract should be terminated and a contract awarded to CIGNA. We also recommend that the agency reimburse CIGNA for its costs of filing and pursuing its protest challenging the award to Palmetto, including reasonable attorneys' fees. Bid Protest

¹⁹ The record establishes that there were aspects of CIGNA's FRP which the agency would have been required to bring to CIGNA's attention if it had conducted post-FRP discussions with CIGNA and that, had these aspects of CIGNA's proposal been addressed, they may well have affected the best-value tradeoff in this [deleted].

Regulations, 4 C.F.R. § 21.8(d)(1) (2006). CIGNA's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel